FILED
JAN 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-729

IN THE

Supreme Court of the United States

October Term, 1983

THE HONORABLE GEORGE V. HANSEN,
Member of Congress, 2D District of Idaho,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Frank A. S. Campbell
William Stoll Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Suite 301
Washington, D.C. 20036
(202) 659-0550

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	i
ARGUMENT	
I. CONGRESSMAN HANSEN'S CLAIMS SATISFY THE REQUIREMENTS OF THE COLLATERAL ORDER DOCTRINE	1
II. THE SPEECH OR DEBATE CLAUSE PROTECTS EIGA REPORTS FILED BY CONGRESSMEN WITH THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Abney v. *United States*, 431 U.S. 651 (1977)	1,5,6
Buckley v. *Valeo*, 424 U.S. 1 (1976)	7
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	1,4,5,6,7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	1
Gravel v. *United States*, 408 U.S. 606 (1972)	8,9
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	1
Immigration and Naturalization Service v. *Chadha*, – U.S. – , 77 L.Ed.2d 317 (1983)	2
Nixon v. *General Services Administration*, 433 U.S. 425 (1977)	2
Stack v. *Boyle*, 342 U.S. 1 (1951)	1

Page

CASES (Continued)

United States v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980) 8

United States v. *Helstoski*, 442 U.S. 477 (1979) 9

United States v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) 1,4,6

United States v. *MacDonald*, 435 U.S. 850 (1978) 6

United States v. *Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) 2,3,4,5

United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983) 7

United States v. *Nixon*, 418 U.S. 683 (1974) 2,10

CONSTITUTION AND STATUTES

U.S. Const. art. I, §6, cl. 1 (Speech or Debate Clause) ..... *Passim*

2 U.S.C. §701 *et seq.* 7

2 U.S.C. §705 9

18 U.S.C. §1001 7

28 U.S.C. §1291 2

ARGUMENT

I. CONGRESSMAN HANSEN'S CLAIMS SATISFY THE REQUIREMENTS OF THE COLLATERAL ORDER DOCTRINE

The government argues in its Opposition that the District Court's denial of Congressman Hansen's non-Speech or Debate claims of selective prosecution and preemption of criminal sanctions for reporting violations under the Ethics in Government Act does not fall within the collateral order exception to the finality rule established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). In *Cohen*, this Court held that the finality rule embodied in 12 U.S.C. §1291 allows appellate review of trial court decisions which do not terminate the litigation only in the limited category of cases satisfying the requirements of what has become known as the "collateral order" doctrine. Such collateral orders " 'must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' " *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The government's position that the *Cohen* criteria are not met here derives principally from its contention that, unlike the claims in *Stack* v. *Boyle*, 342 U.S. 1 (1951) (bail reduction), *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy) and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech or Debate), "the non-speech or debate issues that petitioner seeks to have immediately reviewed are not grounded in any specific constitutional guarantee whose very purpose would be frustrated by the failure to relax the jurisdictional requirement of 28 U.S.C. 1291." (Brief for the United States at 6). However, such a constitutional guarantee is indeed encompassed by Petitioner's non-Speech or Debate claims and its undeniable involvement here is what satisfies *Cohen*'s three-part collateral order standard.

The right whose purpose would be frustrated by disallowing its vindication on appeal prior to trial here exists by virtue

of the constitutional doctrine of separation of powers. That doctrine provides in part that "[o]ne branch [of government] may [not] interfere impermissibly with the other's performance of its constitutionally assigned function." *Immigration and Naturalization Service* v. *Chadha*, – U.S. – , 77 L.Ed.2d 317, 352 (1983) (Powell, J., concurring) (citing *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), and *United States* v. *Nixon*, 418 U.S. 683 (1974)).

As in the case of a prosecution barred by the Speech or Debate Clause because it is based upon acts done in either House, the trial of a Member of Congress in a federal criminal prosecution that is based upon an invalid legal theory or is otherwise fatally defective is a constitutionally impermissible interference by the Executive and Judicial Branches with the representational function of the Legislative Branch. The trial's interference with the Member's representational responsibilities is as great in either case. (*See* Petition at 10-12). The interference becomes equally impermissible in the case involving non-Speech or Debate claims when those claims are amenable to ready resolution before trial and their remedy requires dismissal of the charges. Where such interference may be avoided by the advancement of claims challenging the prosecution through the appellate level before trial, vindication of the interests protected by the separation of powers doctrine requires that the opportunity for such a challenge be afforded.

It was the recognition of the involvement of these separation of powers concerns that led the Second Circuit in *United States* v. *Myers*, 635 F.2d 935-36 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), to hold that a Member of Congress has a right to immediate appeal of "the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment."[1] The *Myers*

[1] Petitioner disagrees with the government's suggestion that the exercise of jurisdiction by the Second Circuit over Congressman Myers' non-Speech or Debate claims was solely on the basis of pendent appellate jurisdiction. (Brief for the United States at 8-9). Rather, the court's reference to pendent appellate jurisdiction was merely to that of an alternative, secondary basis for review of those issues before trial. The court concluded in effect that it could proceed under either of the two jurisdictional theories. The Second Circuit's statement in *Myers* that it "need not determine the

court prefaced its appealability holding by the following observations concerning the doctrine of separation of powers:

> Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.

Id. at 935-36. The court concluded that these same separation of powers concerns exist in federal prosecutions of Members of Congress regardless of whether the Member raises issues based directly upon the Speech or Debate Clause or the separation of powers doctrine.

More specifically, the "right to full representation" protected by the separation of powers doctrine is the right to representation by our elected representatives without unnecessary interference with or interruption of their ability to vote and debate on our behalf in Congress. Thus, in supporting its conclusion that certain non-Speech or Debate claims must also be immediately appealable, the *Myers* Court stated:

> . . . the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of a Congressman, he is their sole voice and vote in the House of Representatives.

Id. The "right to fearless representation" protected by the separation of powers doctrine is the right to representation without the chill or intimidation of a fatally defective federal criminal prosecution of our elected representatives by the Executive

---

full extent of pre-trial appellate jurisdiction in . . . cases" involving Members of Congress, *id.*, 635 F.2d at 936, only serves to underscore the need for this Court to address that question here, particularly in light of now conflicting position of the D.C. Circuit.

Branch. Thus, in further supporting its appealability conclusion, the *Myers* court stated:

> . . . the case for pre-trial review of legal defenses is bolstered by the same [separation of powers] concerns that underlie the Speech or Debate Clause. The primary purpose for the appearance of that Clause in the Constitution was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966). The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before trial has occurred.

Id.

Therefore, as recognized in *Myers*, the identity of Petitioner as a Member of Congress infuses the non-Speech or Debate issues he raises with an incidental right, arising from the separation of powers doctrine, not to be subject to trial on federal criminal charges where his legal claims, whatever their substance, may prevent such a trial. This "right not to be tried" inheres in any legal claim made by a Member of Congress challenging the fundamental validity of the criminal charges brought against him by the Executive Branch.

In delineating the scope of the *Cohen* collateral order doctrine, this Court has recognized the crucial distinction:

> . . . between a right not to be tried and a right whose remedy requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not.

United States v. *Hollywood Motor Car Corp.*, 458 U.S. at 269. (Citations omitted). The conclusion reached in *Myers* can be expressed in the language of *Hollywood Motor Car* as follows –

legal claims made by Members of Congress whose remedy requires the dismissal of federal criminal charges necessarily encompass a separation of powers right not to be tried.

While *Myers* did not reach its appealability conclusion through the explicit application of the *Cohen* collateral order criteria, it is nevertheless clear that each of the *Cohen* concerns can be accounted for in relation to Petitioner's non-Speech or Debate claims. First, the District Court's decision denying the Congressman's motion to dismiss the indictment constitutes "a complete, formal, and in the trial court, a final rejection" of his claims and their incidental separation of powers right against interference with his representational responsibilities in Congress. *Abney* v. *United States*, 431 U.S. at 659. There are "no further steps that can be taken in the District Court" to avoid the trial's interference with the legislative function which is barred by the separation of powers doctrine. *Id.*

Second, the selective prosecution and preemption claims advanced by Congressman Hansen are "collateral to, and separable from, the principal issue at [his] impending trial, *i.e.* whether or not [he] is guilty of the offense charged." *Id.* Contrary to the government's assertion (Brief for the United States at 6), Petitioner's preemption argument is not the same as the motion to dismiss for failure to state an offense held outside the *Cohen* exception in *Abney* v. *United States*. *Id.* at 663. Unlike the latter claim in *Abney*, the preemption claim here does not center on the elements of the offense and hence the question of guilt; rather, it goes to the question of whether criminal subject matter jurisdiction over the filing of Ethics in Government Act reports exists at all. Therefore, as in his selective prosecution claim, Petitioner's preemption claim contests "the very authority of the Government to hale him into court to face trial on the charge against him." *Id.* at 659. Moreover, it is because these claims do contest the government's authority to hale Petitioner, a Member of Congress, into court that they also implicate the separation of powers bar against impermissible interference with the function of the Legislative Branch by the Executive and Judicial Branches of Government, a concern which is also completely independent of the merits of the action.

It is also noteworthy with respect to the second part of the *Cohen* standard that, unlike the speedy trial claim in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the resolution of Petitioner's non-Speech or Debate claims prior to trial is not a speculative exercise; the claims are completely separable from and independent of the merits of the charges and need not be resolved by reference to facts developed or other "events" at trial. *Id.* at 859. (*See also* Petition at 14).

Finally, Petitioner's separation of powers right against impermissible interference with his legislative responsibilities and the constitutional interests it protects is "effectively unreviewable on appeal from a final judgment." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 265. The reversal of a conviction in Congressman Hansen's case will not vindicate the constitutional rights and values incident to the claims he has raised. Such a reversal, dismissing the charges after a trial has occurred, will not prevent or vitiate the chilling effect such a trial has on the independence of the Legislature, nor will it restore the right to representation of hundreds of thousands of constituents lost by virtue of the Congressman's inability to vote or debate in Congress while he was forced to endure an otherwise unnecessary trial. Unlike cases involving speedy trial claims, *United States* v. *MacDonald*, *supra*, or vindictive prosecution claims, *United States* v. *Hollywood Motor Car*, *supra*, "proceeding with the trial" will both "cause" and "compound" the deprivation of the separation of powers rights and values involved here, for it is the trial itself that constitutes the prohibited interference with the legislative function. *Id.* 458 U.S. at 269. The democratic and balance of powers interests inherent in Petitioner's claims "would be 'lost, probably irreparably,' if review had to await final judgment," *Abney* v. *United States*, 431 U.S. at 658. Thus, those interests must be "upheld prior to trial if [they are] to be enjoyed at all." *United States* v. *Hollywood Motor Car Corp.*, 458 U.S. at 270.

Therefore, all of the *Cohen* requirements for the application of the collateral order doctrine are fully satisfied by the non-Speech or Debate claims raised by Congressman Hansen. Accordingly, the District Court's decision denying Petitioner's motion to dismiss the indictment based upon his non-Speech or Debate claims:

> . . . appears to fall in that *small class* which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. (Emphasis added).[2] This result is required both by the deference due the Legislative Branch under the separation of powers doctrine, one of the "fundamental principles of the Government established by the Framers of the Constitution," *Buckley* v. *Valeo*, 424 U.S. 1, 120, (1976), and the democratic rights of the people which that doctrine is designed in part to protect.

II. THE SPEECH OR DEBATE CLAUSE PROTECTS EIGA REPORTS FILED BY CONGRESSMEN WITH THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

In opposing the grant of certiorari on the question of whether the Speech or Debate Clause protects a Member's filing of financial disclosure reports with the House Committee on Standards of Official Conduct pursuant to the Ethics in Government Act of 1978 (EIGA), 2 U.S.C. §701 *et seq.*, the government both misapprehends and mischaracterizes Petitioner's position.

Petitioner's reference to the distinction between the evidentiary use of EIGA reports permitted in *United States* v. *Myers*, 692 F.2d 823, 849 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983) (*Myers II*), and their use here as the basis of a prosecution under 18 U.S.C. §1001 is intended only to emphasize the much greater importance of the Court's addressing the Speech or Debate claim in this case. Petitioner does not suggest that

[2] Significantly, the application of the exception to the finality rule to claims of this nature does not threaten the fundamental policy against piecemeal appeal in criminal cases since, as noted by the Second Circuit in *Myers*, such claims are necessarily limited to the extremely small class of federal criminal cases against Members of Congress, cases which even the government concedes arise only infrequently. (Brief for the United States at 9).

that distinction somehow tips the scales of Speech or Debate protection here; Petitioner agrees that the use of EIGA reports in evidence is equally prohibited by the Speech or Debate Clause and submits that the *Myers II* ruling on this question is incorrect. The distinction serves only to highlight the importance of this Court's addressing the Speech or Debate question in this case even though it refused certiorari on the same question in *Myers II*.

Petitioner's position that the EIGA reports of Congressmen are protected by the Speech or Debate Clause results from the straightforward application of the test for legislative acts set forth by this Court in *Gravel* v. *United States*, 408 U.S. 606 (1972), *i.e.* the filing of EIGA reports by Congressmen is protected legislative activity because it constitutes "an integral part of the . . . communicative processes by which Members participate in" the Congressional disciplinary process, one of the "other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. This conclusion in no way derives from or involves the sweeping propositions suggested by the government that "Congress alone can discipline its members" or that "all activity within the orbit of potential congressional discipline is protected against prosecution." (Brief for the United States at 11-12). Like the testimony of the Congressman in front of the Ethics Committee held protected in *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980), an EIGA report is a communication by a Member to the Standards Committee with the purpose of assisting that Committee in supervising the conduct of the Member in question; as such it falls directly within the *Gravel* definition of a legislative act.[3] It is not an activity which is just "somehow related" to the congressional disciplinary function (Brief for the United States at 11); it is a direct and substantial participation by a Member in the

[3] It should be noted that the reference in the comparative analogy appearing in the last sentence of the last full paragraph of page 20 of the Petition should be to the prohibited use of false testimony by Congressman Eilberg in front of the Ethics Committee as the basis of a federal *perjury*, rather than bribery, prosecution. The point made there is confirmed by the government's own observations that the Speech or Debate Clause prohibits equally the use of evidence of legislative acts and the use of such acts as the basis of a criminal prosecution.

discharge of that constitutionally assigned function. This is what distinguishes the filing of EIGA reports from the conduct held prosecutable in the *Bramblett, Diggs, Brewster* and *Johnson* cases relied on by the government. (Brief for the United States at 11-12). Those acts were not even remotely related to a Member's participation in the discharge of the Congressional disciplinary authority under the Constitution.

Moreover, contrary to the government's assertion (Brief for the United States at 12-13), the prosecution of a Member on the basis of his EIGA reports will indeed involve probing and "indirect impairment" of the deliberations of the Standards Committee. *Gravel* v. *United States*, 408 U.S. at 625. Because of the Committee's power under 2 U.S.C. §705 to determine whether particular matters must be reported under EIGA and whether a Member's report is complete under the statute, it will be necessary for the government to obtain evidence of the Committee's views on these requirements in order for it to establish the element of materiality of the matters it alleges Petitioner has wrongfully omitted from his EIGA reports. In fact, the government has already issued a subpoena to the House Clerk and has expressed its intention to subpoena the Staff Director of the Standards Committee seeking such evidence of materiality. As noted in the Petition at 19, n.4, the House has moved for protective relief from the subpoena on Speech or Debate grounds, a motion whose resolution has been postponed because of the stay of the trial.

Finally, the government argues that the provision of a civil remedy in EIGA is inconsistent with Petitioner's Speech or Debate argument. It is Petitioner's position, however, that since the Speech or Debate Clause makes no distinction between civil and criminal proceedings, it would also provide grounds for the dismissal of any civil action that might be brought against a Congressman based upon his EIGA statements. The civil action could survive dismissal only if there existed a constitutionally permissible "institutional waiver" of the Speech or Debate privilege under this Court's analysis in *United States* v. *Helstoski*, 442 U.S. 477, 492-93 (1979). In this regard, it is important to note that Congress enacted EIGA with its civil penalty provision prior to the decision in *Helstoski*. Thus to the extent Congress may have considered the question

of the Speech or Debate status of a Congressman's EIGA reports (although there is no mention of the question in the legislative history), its so-called attempt to "cede" punishment authority over those statements through the civil penalty section may not survive the "waiver" ruling in *Helstoski*. Thus, whether Congress considered "financial disclosure statements to be protected 'legislative acts' in a civil context" (Brief for the United States at 13) is not dispositive of Petitioner's Speech or Debate claim since it is ultimately "the province and duty of this Court 'to say what the law is' with respect to" the scope of the Speech or Debate Clause. *United States* v. *Nixon*, 418 U.S. at 705.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Frank A. S. Campbell
William S. Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 659-0550

Counsel for Petitioner

January 1984